No. 14,253

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN CRUYSEN,

Appellant,

vs.

KENYON J. SCUDDER, as Superintendent, California Institution for Men, Chino,

Appellee.

BRIEF OF APPELLEE.

EDMUND G. BROWN,
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tions from prisoners at Chino, it being a minimum security institution which is attended usually by men about to be released from confinement. No order to show cause having been issued or served, appellee was probably ignorant of the proceeding.

The Attorney General of the State of California is attorney for Mr. Scudder. The first knowledge this office had of this proceeding was that the matter was on the calendar of the Court of Appeals in Los Angeles for July 16, 1954. The case was apparently then transferred to the San Francisco calendar.

We have borrowed the record from the Court of Appeals and prepared our brief as rapidly as the exigencies of business of this office will permit.

STATEMENT OF FACTS.

The petition for habeas corpus alleges that Cruysen was charged by information with the crime of burglary in Los Angeles County. (R. 6.) Another man, one William Van Bibber, had previously been charged by a separate information with the same burglary. The two informations did not refer to each other or otherwise indicate a joint crime. (R. 6.)

Van Bibber and appellant went to trial together. (R. 6.) There was no motion to consolidate the two informations or otherwise amend the accusatory pleadings to jointly charge Van Bibber and appellant with the commission of the burglary, nor was there any order of the Court to that effect. (R. 6.)

Thus, the appellant alleges he was deprived of due process of law.

Certain other facts relating to this matter appear in the opinion of the District Court of Appeal of the State of California which affirmed appellant's conviction. (*People v. Van Bibber*, 96 Cal. App. 2d 273.*

From the California opinion it appears that Cruysen and Van Bibber were represented by counsel at their trial. In fact, they employed the same counsel. It further appeared that neither man objected to going to trial together nor was there any request for a dismissal or consolidation.

The judge below, after considering the matter, decided that the facts as alleged and admitted did not show a violation of the Constitution of the United States and accordingly denied the application.

This is the appeal.

APPELLANT'S CONTENTIONS.

Appellant argues that it was a denial of due process of law to try appellant jointly with Van Bibber without either ordering a consolidation of the informations or filing an amended joint-information.

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*That the judge below had before him these facts is shown by his order denying the application. (R. 38.) That he had power to consider them is not disputed. (See *Brown v. Allen*, 344 U.S. 433.)

II.

THE PETITION FOR HABEAS CORPUS DID NOT PRESENT A FEDERAL QUESTION SINCE ALL THAT WAS ALLEGED WAS A PROCEDURAL ERROR UNDER THE LAW OF CALIFORNIA.

It does not require extended argument to demonstrate that the point which appellant seeks to raise in this Court is a matter of state law which has been determined adversely to him by the California Court. The decision of the California Court on the law of California is of course binding on the federal Courts.

Let us briefly examine appellant's point. It is claimed that appellant and his co-defendant were charged by separate informations. There should have been either a joint information or consolidation. Concededly, if both defendants had been charged in a joint information, or if there had been a formal order of consolidation appellant would have no complaint. Appellant's claim is that the United States Constitution somehow gives him the right to be charged by a joint information.

But is it not at once apparent that the right for which appellant so strenuously argues is one which is secured to him, if at all, only by the procedural law of the State of California? No authorities are cited, and we deem it to be evident that none can be found, stating that the "right" to be jointly charged is guaranteed by the Fourteenth Amendment. Certainly there is nothing in the United States Constitution prohibiting charging two men with the same crime in separate informations.

Under California law it has been held erroneuos to try jointly two defendants who have been charged in separate informations. *People v. Foward,* 134 Cal. App. 723, 725; *California Penal Code,* §§ 954, 1098. Unless an accused can show that the joint trial resulted in substantial prejudice the error, under California law, is not prejudicial. *People v. Shepherd,* 14 Cal. App. 2d 513, 520.

The California Court has held that appellant was not substantially prejudiced by standing joint trial and that he had waived his rights by failing to object in the trial Court. (*People v. Van Bibber and Cruysen,* 96 Cal. App. 2d 273, 275 [215 Pac. 2d 106].) Thus under the law of California the conviction was proper.

The federal courts must accept the determination of the California Court on a matter of California law. See *Del Marmol v. Heinze* (9th Cir., 1953), 205 Fed. 2d 114.

The federal courts are most certainly not going to attempt to dictate to the California Courts that two co-defendants should be charged by joint information rather than separate informations.

III.

THE JUDGMENT SHOULD BE AFFIRMED SINCE THE JUDGE BELOW DETERMINED FROM AN EXAMINATION OF THE STATE PROCEEDINGS THAT THE STATE COURT HAD GIVEN APPELLANT A FAIR HEARING AND COME TO A SATISFACTORY CONCLUSION.

The judge below dismissed the application for writ of habeas corpus after examining it in light of the opinion in the state Court. He found that the matter sought to be presented in the federal forum had been fully litigated in the Courts of California and that the state Court had come to a satisfactory conclusion. (R. 38.)

The California Court held that since appellant voluntarily went to trial with his co-defendant and made no objection to the joint trial, he could not question the failure to charge him jointly for the first time on appeal especially where there was shown no substantial prejudice to his rights. (96 Cal. App. 2d 273, 275.)

The California Court disposed of Crysen's point as follows:

> "The first complaint is that the trial court failed to order a consolidation of the two informations for trial under section 954 of the Penal Code. Under that section and section 1098 of the Penal Code it has been held error to consolidate for trial two separate informations against different defendants. Such error is, however, one of procedure and not jurisdictional. (People v. Shepherd, 14 Cal. App. 2d 513, 520 [58 Pac. 2d 970].)

"So far as the record here is concerned, the two defendants were to be tried on the same day, before the same jury, on the same charge, and apparently all parties permitted this procedure. No objection or complaint was made to this method of trial. The reporter's transcript indicates that the two defendants were being 'jointly' tried on the same charge. Although the record does not contain a signed order of consolidation the facts shown are tantamount to an order of consolidation. Defendant should not now be heard to complain for the first time on appeal. Since appellant was charged with the same crime, committed at the same time, and the same evidence was applicable to both defendants, and since the error committed was one of procedure and not of jurisdiction and the evidence fully justifies the conviction, it cannot be said that a miscarriage of justice resulted. Under section 4½, article VI, of the Constitution the error was not prejudicial." (*People v. Van Bibber,* 96 Cal. App. 2d 273, 274-275.)

The judge below adopted the California conclusion relying on *Brown v. Allen,* 344 U.S. 433.

In *Brown v. Allen,* the Court stated at pp. 457-458:

"The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. * * * Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue."

The Court in that opinion further stated, 344 U.S. at pages 464-465, 73 S. Ct. at page 411:

> "Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. * * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies."

The cases that have followed *Brown v. Allen* have consistently applied this principle, leaving it to the district judge to determine whether the state court has satisfactorily disposed of the applicant's claims.

Chessman v. People, (9th Cir. 1953), 205 Fed. 2d, 128, 129;

Boyden v. Webb, (9th Cir. 1953), 208 Fed. 2d 201, 203;

United States ex rel. O'Connell v. Ragen, (7th Cir. 1954), 212 Fed. 2d 272, 273;

United States ex rel. Gawron v. Ragen, (7th Cir. 1954), 211 Fed. 2d 902, 904.

Since the judge below exercised his discretion as recognized by the above cited cases in refusing to

grant a hearing the judgment denying the writ should be affirmed.

CONCLUSION.

The argument of appellant is based on a technicality. Appellant was represented by counsel, had full and fair notice of the charge against him, went to trial by jury, was convicted, and had his conviction reviewed by the California District Court of Appeal.

Whether he was charged by a joint information or a separate information is most certainly not of sufficient stature as a federal question to nullify all the California proceedings.

It is respectfully submitted that the judgment be affirmed.

Dated, San Francisco, California,
August 6, 1954.

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